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Supreme Court of the United States

No. 328.

KANSAS CITY TERMINAL RAILWAY COMPANY, A CORPORATION, PETITIONER,

VS.

FRANK A. THOMPSON, TRUSTEE OF AND FOR ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION, AND ZONA GRAHAM, ADMINISTRATRIX OF THE ESTATE OF THOMAS GRAHAM, DECEASED, RESPONDENTS.

BRIEF OF PETITIONER IN REPLY TO RESPONDENTS' BRIEFS.

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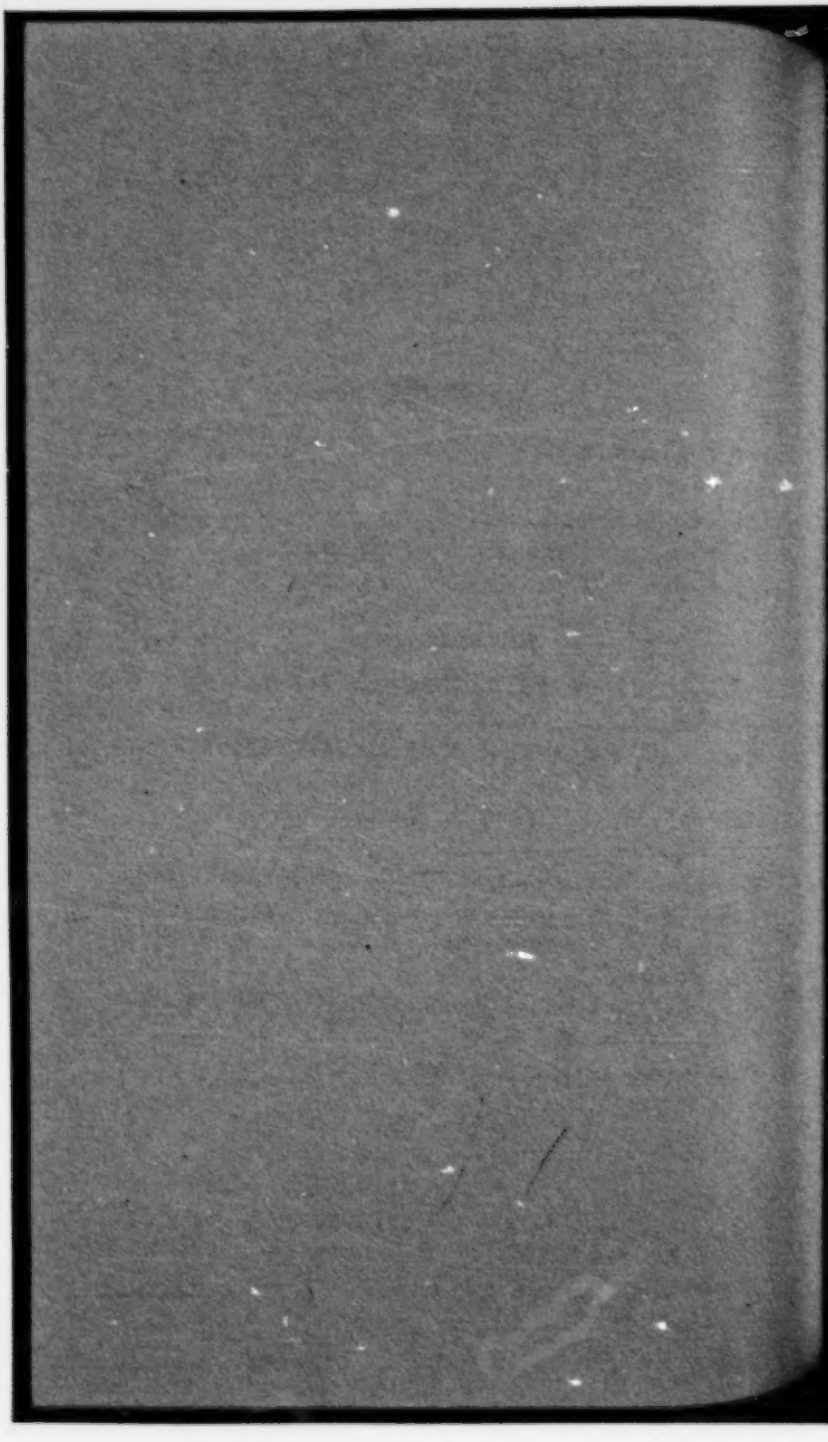

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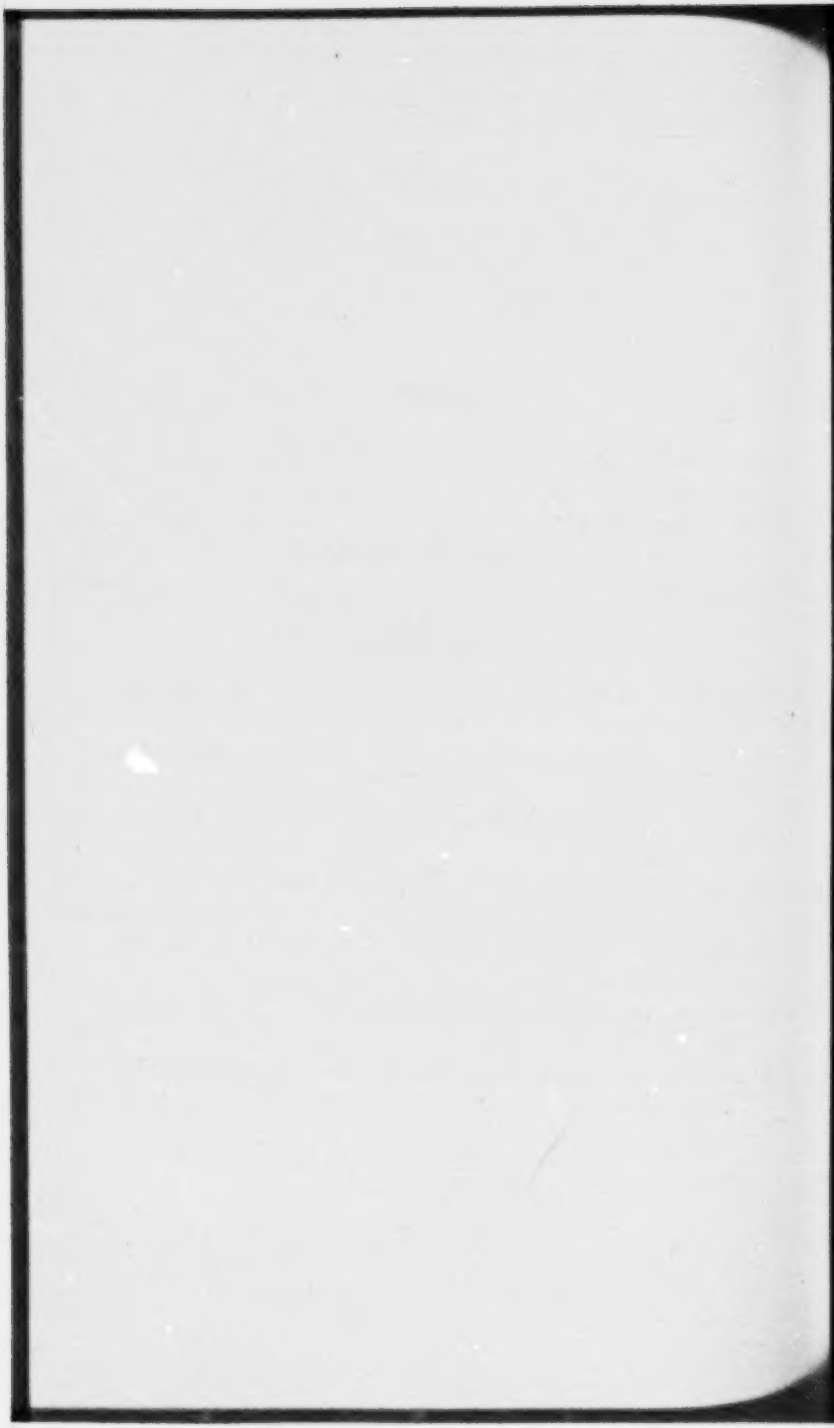

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BRIEF OF PETITIONER IN REPLY TO RESPONDENTS' BRIEFS.

The outstanding characteristic of the briefs of respondents is their failure even to attempt to defend or justify the utterly inconsistent decision of the Missouri Supreme Court that the Missouri lessor lessee statute was superseded and rendered ineffective by the Federal Act for the purpose of determining Frisco's liability thereunder but not so for the purpose of determining Terminal's liability. That precise holding is the kernel of the problem which petitioner has requested this Court to review and decide, and respondents have completely ignored

it. Instead, they resist the petition upon other, and unimportant, grounds. These we briefly consider.

The Federal Question.

Plaintiff argues (pp. 5-15) that the federal question was not properly raised below and was not actually decided by the Missouri Supreme Court. She is mistaken. To demonstrate this, a simple restatement of some of the matter appearing in our petition and original brief is required.

Plaintiff's petition alleged (Tr. 2-8) that Graham was employed by Terminal; that it owned the track over which the Frisco train was being operated; that the use of the track was licensed by Terminal to Frisco; that Frisco alone was negligent; and that "under the law of the State of Missouri" Terminal, as the licensor, was liable *under the Federal Act* to plaintiff for the negligence of Frisco. Terminal's answer (Tr. 11) denied all of these allegations. Thus the federal question was first raised in the pleadings and was properly preserved throughout the trial and the appeal in the Supreme Court of Missouri. Terminal's position was (and is) that it was liable under the Federal Act if Frisco was liable under that Act, but was not if Frisco was not (Tr. 103, 105). Terminal objected to plaintiff's submission authorizing a verdict against it if the jury found Frisco negligent (Tr. 275). The case was submitted to the jury against both carriers under the Federal Act, and that submission was affirmed by Division Two of the Missouri Supreme Court (Tr. 355). The Court *en banc* the first time reversed the judgment against both railroads (R. 400). Because these results in the trial court and in Division Two and in the court *en banc* the first time were all consistent with Terminal's position, there was never any decision upon the federal question to which Terminal could object until the second decision of the

court *en banc*. That decision on rehearing, reversing the judgment against Frisco and affirming it against Terminal, was the *first* time the decision on the federal question adversely affected Terminal, and its motion for rehearing and this petition immediately followed. Plaintiff's present claim of the untimely raising of the federal question is without merit.

The foundation of plaintiff's present argument that the court below decided no federal question appears in what that court, and respondents now, characterize as Terminal's "trial and appeal theory." We had thought that we had sufficiently shown in our original brief the complete absence of any support in the record for such a claim, but, because both plaintiff and Frisco monotonously repeat it, we state again the reasons why such a claim is unfounded. Terminal always admitted, but admitted only, that it was liable to plaintiff under the Federal Act if Frisco was liable under that Act. Terminal always claimed that if Frisco was not liable under the Federal Act, it was not either. The broad conclusion by the court below and by respondents now that Terminal admitted that if Frisco was negligent, Terminal was liable, is simply incorrect.

Furthermore, that is not the ground upon which the Missouri Supreme Court put Terminal's liability. It categorically declared the law to be (Tr. 463) "as Frisco's lessor, Terminal is liable under the Federal Act for the death of its own employee if Frisco was negligent." It is the application here of this purported rule of law which sharply presents the federal question. How can non-negligent Terminal be liable under the Federal Act for Frisco's negligence solely by virtue of a state statute held by the court to have been superseded by the Federal Act as to Frisco's liability? If, as the Missouri Supreme Court

said (Tr. 454), "the Federal Act is controlling, exclusive and supreme with respect to which railroads shall be held liable thereunder," then the Missouri statute must necessarily be just as ineffective in determining Terminal's liability as it was held to be in determining Frisco's liability. If the Federal Act exclusively measures Frisco's liability, it must also exclusively measure Terminal's liability. But the Missouri Supreme Court did not so measure Terminal's liability. It applied to it the state statute also. Thus was the federal question decided adversely to Terminal. Contrary to plaintiff's argument (pp. 13, 15), the real legal basis of the court's finding of Terminal's liability was its direct holding that the Federal Act superseded the Missouri statute as to Frisco but not as to Terminal.

The Conflict.

Respondents claim (plaintiff's brief, pp. 15-20; Frisco's brief, pp. 13-14) that the decision below is not in conflict with the decision of this or any other court. We observe:

1. Such an argument necessarily admits, and conclusively demonstrates, what we assert in our original brief (p. 28)—namely, that the Missouri Supreme Court did not construe the Missouri statute one iota different from its previous accepted construction. It has always been construed by the Missouri courts to make the lessor and lessee liable for the negligence of the other (as the Missouri cases on page 28 of our original brief show), and that same construction was not questioned or denied by the court below in this case. In fact, that court never even bothered to construe the state statute at all. It simply held that, notwithstanding the accepted construction and regardless of what it meant, no effect could be

given it in this case in determining Frisco's liability because the Federal Act is "controlling, exclusive and supreme with respect to which railroads shall be held liable thereunder" (Tr. 454), but in ascertaining Terminal's liability, it ignored what it had just held, and gave full effect to the state law under the Federal Act. Whether that conclusion is right or wrong is all we ask this Court to decide.

2. The Zachary and the Lloyd cases in this Court and the various federal and state court cases cited in our petition and original brief and in plaintiff's brief (pp. 15-20) are directly in conflict with the holding of the Missouri Supreme Court that the Federal Act requires the existence in fact of a contractual relation between the employer and employee. An employee of the lessor is just as much an employee of the lessee for the purpose of Federal Act suits as an employee of the lessee is an employee of the lessor. Because the Missouri Supreme Court has erroneously construed and failed to apply the Federal Act consistently as to both railroads here, Terminal will be required either to pay a judgment which neither it nor Frisco should pay, or one for which Frisco should reimburse Terminal.

3. Whether or not the reported cases are in conflict with the decision below upon their facts, they are certainly in conflict upon principle, for in each of those cases, this Court and the inferior federal courts and the various state courts have uniformly enforced in Federal Act cases lessor and lessee liabilities created by state law different from their usual liabilities under the Federal Act. That principle is firmly established by all of these cases but was repudiated by the Missouri Supreme Court when it freed Frisco. Not content with this departure from recognized legal principles, that court completely

left the rails by ignoring its own holding that "the Federal Act is controlling, exclusive and supreme with respect to which railroads shall be held liable thereunder" and finding Terminal liable solely because of the very state statute it said was superseded. All of the cases are clearly contrary to such a result.

The "Only Result."

Plaintiff claims (pp. 20-29) that in freeing Frisco and in holding Terminal liable, the Missouri Supreme Court reached "the only result which could ever be reached in this case" because (1) Frisco was made Terminal's agent by the state statute, and the Federal Act makes the carrier responsible for the negligence of its agent, (2) the liability of Terminal for the negligence of Frisco was a matter of state law, and (3) Terminal is a joint tort feasor, and therefore recovery against it is proper. These claims are without merit.

1. If Terminal were itself negligent, it would be liable to plaintiff under the Federal Act. Admittedly it was not. If it is liable for Frisco's negligence, it is only so liable by virtue of the state statute. Nothing in the Federal Act makes it liable, for that Act predicates recovery upon the defendant's negligence. But if, as the Missouri Supreme Court held, the Federal Act supersedes the state statute, then the only conceivable basis of Terminal's liability here is gone. Therefore it cannot be liable, because it was itself not negligent and because it is not responsible for Frisco's negligence. Plaintiff's argument on page 22 assumes an effective state statute. But the court below held that statute ineffective, so that Frisco cannot, by that statute, be the Terminal's "agent." Absent the state statute, there is no basis for claiming any agency. Clearly the operating agreement between Ter-

minal and Frisco does not have this effect; it does not impose any "joint" or any other kind of liability upon Terminal for the acts of Frisco. *Hull* v. *Philadelphia & R. Ry. Co.*, 252 U. S. 475, 64 L. Ed. 670; *Robinson* v. *Baltimore & O. R. Co.*, 237 U. S. 84, 59 L. Ed. 849; *Chicago & A. R. Co.* v. *Wagner*, 239 U. S. 452, 60 L. Ed. 379; *Stevenson* v. *Lake Terminal R. Co.*, (6 Cir.) 42 F. 2d 357.

2. The questions whether or not Graham was an employee of Frisco and whether or not the Missouri statute generally makes the lessor liable for the lessee's negligence were, as plaintiff claims (pp. 23-25), exclusively questions of state law. Whether or not the state statute should and could be so construed was purely a matter of interpretation of the local statute, with which this Court has no concern. But that is not the question here. The Missouri Supreme Court did not purport to construe the state statute. It held that, regardless of the construction of that statute, its effect (whatever it might be) was superseded by the Federal Act as to Frisco but not as to Terminal. The propriety of that construction of a federal statute holding a state law bad under it as to Frisco but good under it as to Terminal is the question in this petition. That certainly cannot be answered by the assertion of the simple proposition that the construction of the state statute is a matter for state court determination. Clearly the proper relation between the Federal Act and the Missouri statute is a federal matter which this Court should decide.

Plaintiff misstates (p. 24) the effect of an excerpt from one of our briefs in the Missouri Supreme Court *en banc*. The remarks quoted on page 24 were made in response to the claim of *amicus curiae*, Terminal Railroad Association of St. Louis, that the construction and effect

of the Missouri statute were questions upon which the opinions of the federal courts were controlling. Of course they are not, and we say again here what we said there. The construction and effect of the Missouri statute are solely matters for the Missouri Supreme Court, but, when that court goes further, as it has, and holds that a federal statute supersedes the state law as to a lessee railroad but not as to the lessor railroad, an important federal question of the proper relation of the two laws, federal and state, is raised and should be decided.

3. Common law liabilities of joint tort feasors have no place in this case. The problem here is the effect to be given federal and state statutes. Terminal concedes "joint" liability (under the state statute) only if Frisco is liable under the Federal Act. Plaintiff's argument on pages 25-29 is wholly beside the point.

Contrary to plaintiff's claim, the Missouri Supreme Court reached the only result which cannot be sustained. Either both railroads are liable under the Federal Act (as Division Two held (Tr. 356)) or neither is (as the Court *en banc* first held (Tr. 401)). One or the other cannot be liable alone.

Construction of the Missouri Statute.

Frisco claims (pp. 8-12, 13-14) that the Missouri statute has never been construed by a Missouri court to make the employee of the lessor the employee of the lessee for the purpose of Federal Act suit. Even if this is true, it is scarcely any reason for denying the issuance of the writ. The error of the Missouri Supreme Court was its decision that the Federal Act exclusively governed the rights of Frisco but not the rights of Terminal. The propriety of this ruling does not depend upon whether or not the Mis-

souri statute makes Graham Frisco's employee. The court below did not even decide that question.

But is it true that the state statute does not make the employee of the lessor the employee of the lessee? Frisco says yes, because, it claims, its liability as lessee is prescribed by the statute to be "as if operating its own road" and this means simply that of an owner. But Division Two held in this case that this phrase did not so limit the lessee's liability but included its liability for the lessor's acts to the same extent as the lessor's statutory liability for the lessee's acts. That part of the state statute providing that the satisfaction of a claim or judgment by either shall discharge the other makes clear the mutual liability of the lessor and lessee.

Spaw v. *Kansas City Terminal Ry. Co.*, 198 Mo. App. 552, 201 S. W. 927, is this case exactly and illustrates the interpretation and effect given the state statute by the Missouri courts. There the common law suit of the employee of the lessor against both the lessor and the lessee for the negligence of the lessee was held to be improperly brought because the Missouri statute made the employee of the lessor the employee of the lessee so that the Federal Act exclusively governed his rights against both carriers. Of the effect of the Missouri statute, the court said (l. c. 559):

> The theory and purpose of such law is to prevent a railroad from evading the responsibility involved in the exercise of its corporate functions by delegating the operation of its road to another. Nor can a railroad avoid such responsibility by using the tracks of some other railroad. In other words, the effect of such law is to make the road that owns the track and the road that uses it *joint operators* of the highway thus existing, so far the duties and responsibilities involved in the exercise of railroad corporate functions are

concerned. It would seem to follow that if an employee of the lessor or licensor was injured while engaged in work which, at one and the same time, was not only a part of the general interstate commerce of the lessor or licensor but also of the particular interstate commerce being carried on by the lessee or licensee, then such injured person would * * * be engaged in the interstate commerce of both roads, and would be an "employee" of both roads within the meaning of the Interstate Commerce Act. [*North Carolina R. Co.* v. *Zachary, Admr.*, 232 U. S. 248] * * * Since the State statute makes the two railway companies, in the case at bar, *joint operators* of the road, *each responsible for the acts of the other in performing their corporate functions as a railroad*, at least within the limits hereinabove defined, and makes the equipment of the lessee the equipment of the lessor, and the road-bed of the lessor the road-bed of the lessee, *and the employees of each, the employees of the other*, with respect at least to the performance of the common functions of each railway company as a public carrier; and since the Federal statute makes any common carrier engaged in interstate commerce liable for injury to persons employed by it, in such commerce, due to * * * negligent operation of, either equipment or road, then it follows that the Federal Act makes each, the lessor and lessee, liable for injuries to the employees of the other, received while engaged at the time in interstate commerce, * * * caused by * * * negligent operation of either the lessor's road or the lessee's equipment. *Consequently, plaintiff is, by virtue of local law, to be regarded as the agent and employee of both roads*, and as both were engaged in interstate commerce and plaintiff was, at the time of his injury, engaged in the interstate commerce of both roads, *he will be regarded by the Federal law as an employee of both* and his right of action for the injury is governed and controlled exclusively by the latter law (Emphasis ours).

This opinion (never overruled or questioned by the Missouri Supreme Court) makes crystal clear the legal basis upon which the mutual liability of the lessor and lessee for the acts of the other rests. That basis is that, by the statute, the employees of one become the employees of the other. The legal basis is not imputed negligence at all, as Frisco would have this Court believe (pp. 9-14). *Miller v. Terminal R. R. Ass'n*, 349 Mo. 944, 163 S. W. 2d 1034, drives this point home. There the Federal Act suit of the employee of the lessor against the lessor for the negligence of the lessee was upheld. Terminal was the lessor; Mobile & Ohio the lessee. Of the effect of the Illinois statute (identical with Missouri's), Division One of the Missouri Supreme Court said (l. c. 954):

> It is quite clear, we think, that if there is a local law such as existed in the *Zachary case, supra,* and as exists in the present case, then an employee, injured or killed under such facts, as here, an action for such injury or death is properly under the Federal Employers' Liability Act. In the present case, the trial court instructed the jury "that *under the law of this case the agents and servants of the * * * Mobile & Ohio Railroad Company, * * *, are to be regarded by you as the agents and servants of the defendant." In view of the local law obtaining in Illinois, we think the instruction correctly stated the law.*
>
> * * * our ruling that the local law of Illinois made the employees of the M. & O., in law, the employees of defendant in so far as concerns responsibility for the death of Miller, * * * (Emphasis ours).

There is no substance in Frisco's argument that the Missouri statute does not make the employee of the lessor the employee of the lessee for the purpose of Federal Act suit.

Admittedly the purpose of the Missouri statute is to prevent the evasion of a railroad's charter obligations to the public by delegating the operation of the railroad to

another. But the Missouri courts have never, as Frisco intimates (p. 11), confined the statute to the lessor alone. A lessee cannot escape its charter obligations to the public either by running on the tracks of another, and the public to whom the obligation is owed includes employees of the lessor. Satisfaction of the statutory purpose requires the inclusion of both the lessor and the lessee within its imposition of mutual liability. *Miller* v. *Terminal R. R. Ass'n, supra; Spaw* v. *K. C. Terminal Ry. Co., supra; Francis* v. *Terminal R. R. Ass'n*, 354 Mo. 1232, 193 S. W. 2d 909.

Frisco claims (pp. 3, 9) that its license to operate over Terminal tracks was limited to Track 2. This is not true; it included all tracks owned by Terminal (Tr. 47).

CONCLUSION.

Respondents completely disregard the legal basis of our petition. Can the Federal Employer's Liability Act be construed to override a state statute to free a non-employing lessee under the Federal Act but not to override that same statute insofar as it makes a non-negligent lessor liable under the Federal Act for the sole negligence of its lessee? Nothing respondents have said justifies a denial of the writ.

Respectfully submitted,

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